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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 622

WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

WILLIAM R. MCCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 69–88) are not yet officially reported. The opinion of the Circuit Court of Appeals (R. 1214–1229) is reported at 165 F. 2d 65.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 9, 1947 (R. 1213). The petition for certiorari was filed February 24,

1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether persons engaged in operating petitioner's telegraph equipment and performing other services necessary to the conduct of petitioner's telegraph business at branch "agency offices" located on premises not owned or leased by petitioner are "employees" of petitioner within the meaning of the Fair Labor Standards Act.

2. Whether Section 2 of the Portal-to-Portal Act of 1947 relieves petitioner from liability under the Fair Labor Standards Act and withdraws the jurisdiction of the courts in the present case.

STATUTES INVOLVED

The statutory provisions involved are Sections 3 (d), 3 (e), 3 (g), 6 (a) (3), 7 (a) (3), 11 (c), and 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Sections 1 (a), 2 (a), 2 (b), 2 (d), and 13 (a) of the Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st sess. These sections are printed as an appendix to this brief.

STATEMENT

The comprehensive findings of fact by the trial court (R. 69–88), fully concurred in by the Circuit Court of Appeals (R. 1214–1215), state

in detail the pertinent facts. Since petitioner's "Summary Statement" admittedly ignores the findings concurred in by the two courts below (Pet. 12–13, 18),[1] the following summary of the findings of fact and the supporting evidence is more detailed than might otherwise be deemed appropriate in response to a petition for certiorari.

1. *Establishment of agency offices.*—Petitioner, Western Union Telegraph Company, is a New York corporation having its principal office at New York City, New York, and branch offices and places of business throughout the United States (Fdg. I, R. 69). This case is concerned with eight of petitioner's offices located at various Kentucky towns. It is not denied that petitioner conducts an interstate and worldwide telegraph communications business. Prior to the period in the complaint, Western Union maintained and operated regular Company offices employing persons who were admittedly its employees at each of the eight towns (Fdg. V, R. 70, 71, 113, 114). Beginning shortly before the effective date of the Fair Labor Standards Act of 1938, petitioner entered into an intensive program to convert many of its company offices located in small towns into so-called agency offices, originally designated as 11–B and later 9–A offices (Fdg. IV, R. 70, 118–120).

[1] As in the Circuit Court of Appeals, petitioner contends that "the 'Findings of Fact of the District Court' are clearly erroneous" (Pet. 12–13, 18). The court below rejected this contention (R. 1215).

Pursuant to this program the company offices in each of the towns here involved were designated "agency" offices before commencement of suit, and, with one exception, continued as such until the trial of this case (Fdg. V, R. 70–71). The chief purposes of converting these "company offices" into "agency offices" were to save money by reducing expenses, principally wages, and to increase revenues by extending the hours of service (Fdg. IV, R. 70, 168, 201–203, 271–274).

Petitioner presumably entertained the theory that the application of the minimum wage and overtime provisions of the Fair Labor Standards Act could be avoided by having its telegraph business carried on by establishments engaged in some other independent enterprise (Fdg. VII, IX, R. 71, 72). Consequently, it was the practice of Western Union to designate such an enterprise as its agent (*Ibid.*). However, in several instances, telegraph offices were designated agency offices although they were operated by individuals devoting their time to Western Union business in substantially the same manner as employees at company offices. At times, the Company designated a wholly fictitious business enterprise as agent, when the true agent actually had no independent business but devoted his full time to Western Union business (Fdg. IX, R. 72). Occasionally, an individual who himself performed all the telegraph work was designated agent (R.

732, 740). In other instances an agent was designated who was expected to have others perform the work (R. 329, 652, 1162, 1163, 1063, 1032, 1137). In all cases whether the agents themselves acted as operators or selected others to do this work, the operators spent a substantial amount of time in performing telegraphic services (R. 676, 773, 791, 1021, 1067, 1141). Moreover, it was necessary that someone be available at the agency offices to render Western Union service at all times during the established hours of service (Fdgs. VI, XV, R. 71, 75–76).

Payment of the operators at the agencies assumed various forms. Record agents who devoted all or part of their time to Western Union work received their compensation directly from the Company (R. 634, 636–637, 730, 732). In some instances, however, Western Union checks payable to record agents, with the knowledge of petitioner, were indorsed over to individuals whose entire time was spent in operating Western Union's equipment (R. 618, 666–667). In other instances the 9–A agents received checks from Western Union, and paid the individual operators fixed wages (R. 676, 767, 778, 601–602, Fdg. XXVII, R. 84).

2. *Integration of agency offices with Western Union operations.*—Notwithstanding some differences in the nature of the agent, the agency offices involved in this action all operate in the same

manner and the individuals who perform the telegraphic services stand in virtually the same relationship to petitioner as employees in Western Union company offices (Fdg. VIII, R. 72, 245–247). In the majority of cases the agency offices were established on the basis of a simple oral understanding between petitioner and the "agent" that for an agreed commission, expense and delivery allowance, the "agent" would conduct Western Union's business in accordance with Company rules and regulations, and would maintain certain published hours of service (Fdg. VI, R. 71) which were longer than those previously maintained by petitioner at its Company offices (Fdg. IV, R. 70, 168, 169, 201). This agreement made no mention of the period of time for which it was to be in effect and did not provide that notice by either party was necessary to terminate the arrangement (Fdg. VI, R. 71, 546, 629, 642, 731). The designated 9–A agents could be removed at will and without notice (Fdg. VI, R. 71, 629, 568, 668).

Petitioner furnishes all equipment necessary to handle the telegraphic business (Fdg. X, R. 73, 165, 166). The equipment remains the property of Western Union and "is installed, moved when necessary, regularly inspected, maintained and repaired by the Company" (Fdg. X, R. 73). By means of the Western Union equipment each agency office is in continuous communication with

the Western Union relay offices and agency "operators are directed to call on the relay office for instructions in handling any matter with which they are not familiar" (Fdg. XVII, R. 79, 615).

All bookkeeping and accounting with respect to all transactions at the agencies are done by the company at its relay offices and the agencies are held accountable for charges as computed by the relay office (Fdg. XIII, R. 75, 155). All billing and collecting on agency charge and telephone accounts are done by the relay office (Fdg. XIII, R. 75, 155). Prior to the commencement of this action, petitioner required its 9–A agents at the end of each month to transmit their gross receipts (as computed by petitioner's relay office) to the relay offices where commission and expenses were computed and remitted the 9–A agent.

3. *Supervision and control of agency offices and personnel by Western Union.*—Western Union maintains continuous, direct and comprehensive supervision and control of the agencies. The agency offices are under direct and immediate supervision of Western Union's regional managerial officers (R. 800–803, 245–247, 260–262). As found by the trial court, "for all practical purposes, other than the direct hiring and firing of personnel employed by the agents and direct payment of salaries to some of such personnel, the Company's relation to the agencies has been and is substantially the same as it was before

the conversion was effectuated." (Fdg. VIII, R. 72, 1216.) When the agency is first established, a Western Union instructor is assigned to educate personnel in the use of Western Union equipment and the details of all applicable routines, rules and regulations (Fdg. XVII, R. 77–79, 593, 605–606, 625–627). The initial instruction period is followed up by regular supplementary instructions and regular visits by Western Union representatives (Fdg. XVII, R. 77–79, 256, 275–278, 280).

The Company exercises complete control over the finances of the agencies. It exercises close supervision over the handling and transmission of money order principal, funds received for the transmission of messages, and the extension and continuation of credit to the agencies and their customers (Fdg. XX, R. 80–81, 156–157, 159, 160, 161). The agencies are required to secure petitioner's prior authorization before extending credit to customers (R. 159, 160, 161).

The Company also controls the hours of service of the agency personnel. Petitioner required a prospective agent to agree, as a condition to being designated agent, to maintain at least the daily hours of service prescribed in the Company's published tariffs, as well as the Sunday and holiday hours being observed by Western Union (Fdg. XV, R. 75–76), and "longer hours if possible" (R. 169). The Company consistently resisted any attempts by the agents to reduce

their hours of operation (R. 169). The agencies were not authorized to reduce hours of service, or vary from the published hours even temporarily, without Company permission (Fdg. XV, R. 76). Agencies failing to maintain the prescribed hours were threatened with termination of the agency (R. 169, 170, 330–331).

The supervision and control of petitioner also includes active participation, directly as well as indirectly, in personnel matters of the agencies. Although the agencies have authority to hire and fire, petitioner also makes suggestions to the 9–A agent with respect to the hiring of specific individuals and on occasion has issued instructions to prevent the employment of a particular person by the agent (Fdg. XXI, R. 82, 416, 333, 334). Complaints with respect to violations of State wage and hour laws by agency personnel are also dealt with directly by the Company (Fdg. XVIII, R. 79–80, 336–338).

All individuals at the agencies handling funds derived from petitioner's business are required to submit applications for bond which designated them interchangeably as the "agent" or "employee" of petitioner who, in turn, is designated as "employer" and beneficiary of the bond (R. 141–147, 152). The same form of bond application is used by petitioner in bonding its admitted employees (R. 143). Premiums on the bonds are paid by petitioner (R. 150). For social security tax purposes, the Treasury Department ruled that

the 9–A agents and others employed at the agency to operate petitioner's facilities were employees of Western Union (Pltf.'s Ex. No. 81, R. 295–300). Petitioner's interpretation of the ruling, contained in an extensive memorandum to its Superintendents and District Superintendents (Pltf.'s Ex. 81, R. 295–300), was that the compensation paid the 9–A agents "shall be treated as wages for social security, income tax and Victory tax purposes, effective with payment of compensation for the month of January, 1943" (R. 295). Thereafter petitioner paid social security taxes on its 9–A agents (Fdg. XII, R. 74) but not on other employees at the agencies (R. 225, 295–300).

4. *Investment, risk, and opportunity for profit or loss.*—Western Union made all the investment in facilities to conduct the telegraph business at the agency offices, assumed all risks of the business, and controlled opportunities for profit or loss of the agent by fixing charges and engaging in its own business promotion. All expenses of operating the agency, at first directly and later indirectly, were borne by the Company (Fdg. XII, R. 74, 258, 259–260, 296–297, 432).

The agency offices have little or no opportunity to influence profit or loss by their own efforts. The Company controls the earnings of the agents by controlling the charges. The agents are paid a commission on the proceeds received from transacting Western Union business, plus a delivery allowance (Fdg. XVI, R. 76–77).

The Company takes the initiative in stimulating business by having its own representatives, who make periodic visits to the agency offices, call upon the business concerns in the vicinity, call their attention to the hours of service of the agency and advise them of economies that may be effected by using Western Union service. They also invite customers to use the facilities at the agency office on credit and leave credit cards to facilitate their taking advantage of this offer (R. 252, 442–444, 161–162). The Company also assumes all the risks of the business. It assumes full responsibility for claims for damages arising out of the transaction of Western Union business at the agency (Fdg. XIX, R. 80, 175). It assumes the risk of credit extended to customers (Fdg. XX, R. 80, 172–173, 243). Collection of delinquent accounts is undertaken directly by the Company (Fdg. XVIII, R. 79).

5. *Non-Compliance with requirements of Act.*— It is not disputed that the persons employed at the various agencies have not been compensated in accordance with the minimum wage and overtime requirements of the Act (Fdgs. XXVIII, XXIX, R. 84, 602, 778, 794).

RULINGS OF COURTS BELOW

The district court concluded that an employment relationship, within the meaning of the Act, existed between petitioner and the persons conducting the Western Union business at the

agencies, and that violations of the Act resulted from their failure to be paid in accordance with the minimum wage and overtime requirements of the Act for the conduct of Western Union business (R. 86–87).

The Circuit Court of Appeals, concurring in the findings of the District Court, affirmed. The court further held that the Portal-to-Portal Act of 1947, enacted subsequent to the district court's decision, has no bearing on this case. (R. 1228–1229.)

ARGUMENT

1. *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, *United States* v. *Silk*, 331 U. S. 704, and *Harrison* v. *Greyvan Lines*, 331 U. S. 704, establish the correctness of the decision below. Petitioner's attack on the decision below is essentially that the findings of fact are "clearly erroneous" (see Pet., pp. 12–13, 18). The petition in effect requests this Court to go behind the concurrent findings by two courts and to reexamine an extensive record of oral as well as written evidence, much of which called for the trial court's judgment on the credibility of witnesses and the weight to be given their evidence. See *Anderson* v. *Abbott*, 321 U. S. 349, at 356; see also *United States* v. *O'Donnell*, 303 U. S. 501, 508; cf. *United States* v. *Silk*, *supra*, at 716–717; *United States* v. *United States Gypsum Co.*, No. 13, October Term, 1947, decided March 8, 1948. As is demonstrated by the facts set forth in our

Statement, *supra*, and in the opinion below (R. 1215), the findings in all substantial respects are supported by ample evidence and cannot be shown to be "clearly erroneous."

The findings established the presence in this case of all of the significant factors which this Court has regarded as indicative of an employment relationship and virtually none of the indicia of an independent contractor. The agency offices are completely integrated with Western Union's system, and "for all practical purposes, * * * the Company's relation to the agencies has been and is substantially the same as" the Company's relationship to regular Company offices (Fdg. VIII, R. 71–72). None of the 9–A agents makes any investment in the Western Union business or assumes any risk. All equipment and supplies, including teleprinters, typewriters, counters, safes, and even pencils, are furnished by petitioner, and all equipment is installed and maintained by petitioner at no cost to the agency (Fdg. X, R. 73). Even the boners who owned their knives, meathooks, and belts in the *Rutherford* case, and the unloaders who owned their own picks and shovels in the *Silk* case, both of which groups this Court held to be employees and not independent contractors under the Fair Labor Standards Act and the Social Security Act, respectively, made a greater investment in tools and equipment than do petitioner's 9–A agents.[2]

[2] In addition, petitioner reimburses the agency for items of fixed expense such as rent, phone, lights, heat, power (Fdg.

The nature and degree of control exercised by petitioner over the agency offices is also plainly characteristic of an employment relationship, not of an independent enterprise. Petitioner not only had continuously "kept close touch" on the agency activities (cf. *Rutherford* case, *supra,* at p. 730), and not only is "in a position to exercise all necessary supervision" (cf. *Silk* case, *supra,* at 718), but "has effectively prescribed not only the broad terms and conditions of work at the agencies, but has, as well, directed the minutiae of daily activities." (See Fdg. XIV, R. 75.)

Unlike a genuine independent contractor, petitioner's 9–A agents have no opportunities for increasing their profits by their own initiative and are not subject to any losses in their performance of Western Union's business. In operating the agency offices, the 9–A agent clearly is not engaged in an independent telegraph business. The agencies simply take such business as comes to an ordinary Western Union office or such business as the Western Union representatives send to them or permit them to take. For this they are paid a stipulated commission plus a delivery

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XII, R. 74). See *Walling* v. *Twyeffort*, 158 F. 2d 944 (C. C. A. 2), certiorari denied, 331 U. S. 851, holding that outside tailors who owned their equipment and furnished their own workshops, but who were reimbursed monthly for rent and other expenses incurred in maintaining their shops, were employees within the meaning of the Fair Labor Standards Act.

allowance, an arrangement "more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor" (*Rutherford Food Corp.* v. *McComb, supra,* at 730). The profits of the agencies depend even less upon efficiency and independent initiative than did the profits of the boners in the *Rutherford* case. The agencies' risk of loss corresponds to its lack of opportunity for profit. Petitioner, not the agency, assumes all the risk, even liability arising out of faulty transmission of messages by the agents (see Statement, *supra,* 11).

Considering "the total situation," not only has petitioner retained the investment, control, and entrepreneurial risk "characteristically associated with the employer-employee relationship" but the personnel conducting Western Union business at these agencies "as a matter of economic reality are dependent upon the business to which they render service." See *Bartels* v. *Birmingham,* 332 U. S. 126, 130. Here, as in the *Rutherford* case, "the work done, in its essence, follows the usual path of an employee" and "putting on an 'independent contractor' label does not take the worker from the protection of the Act" (see *Rutherford* opinion, at p. 729). The *Rutherford* case establishes that in such circumstances an employer cannot escape responsibility under the Act by

interposing an intermediary to whom the authority to hire and fire and pay wages is delegated.[8]

2. Petitioner's reliance on an asserted conflict between the decision below and that of the Fourth Circuit Court of Appeals in *Blankenship* v. *Western Union Telegraph Co.*, 161 F. 2d 168, fails to take into account the decisions of this Court subsequent to the *Blankenship* decision, as well as other significant factors which differentiate the two cases. As pointed out by the court below (R. 1227), the *Blankenship* case was decided prior to the decision of this Court in *Rutherford Food Corp.* v. *McComb, supra; United States* v. *Silk, supra; Harrison* v. *Greyvan Lines, supra.* The *Blankenship* decision rested, in part at least, on factors which this Court's subsequent decisions held of little or no significance; and the circumstances of the *Blankenship* case clearly differentiate it from the instant case.

[8] Petitioner's objection to the use of the word "receive" in the injunction (Point III, Pet. pp. 31–32) is plainly without merit. The injunction by its terms makes petitioner responsible only for the time the employee is "required to be present and available for" or is "actually engaged in" carrying on the telegraph business (R. 89). That the differentiation which petitioner makes between the word "pay" and the word "receive" was not contemplated by Congress is evident from the use interchangeably of these words in Sections 6 and 7 of the Act. Cf. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 408, holding that the tips received by redcaps from customers of the Terminal Company may be credited against the minimum wage which the Act requires that employees "receive."

As the court below observed, the *Blankenship* case had come to the circuit court of appeals "in an unusual course" (R. 1227). It was a declaratory judgment action brought by the partnership "agency."[4] The case was decided on a motion to dismiss the complaint which did little more than set forth the contract between the partnership and Western Union. There was no trial and no comprehensive presentation of "the circumstances of the whole activity" (*Rutherford* case, *supra* at 730) or evidence relating to "the total situation, including the risk undertaken, the control exercised, [and] the opportunity for profit from sound management" (*Silk* case, *supra* at 719), which this Court has held most significant in determining the nature of the relationship. The complaint did not allege a close integration of the agency operations with Western Union's communication system, nor a detailed and direct supervision and control of all aspects of the agency's operations, nor did it allege a substantial investment in equipment by Western Union and complete lack of investment by the partnership, a complete assumption of responsibility and risk by

[4] The reason for the institution of a declaratory judgment proceeding instead of an action under Section 16 (b) of the Fair Labor Standards Act does not appear. The complaint in the *Blankenship* case was filed on December 12, 1945, five months after the Administrator instituted proceedings in this action. The Administrator was not advised of the date of the argument of the appeal until it was too late to present his views to the appellate court.

Western Union, nor the various other factors relevant to the existence of an employment relation which the district court found as a fact to exist in the instant case. Thus, on appeal, the only available information relevant to the employment issue was the complaint and the contract.

In the instant case, on the other hand, there was a full trial, and on the basis of extensive evidence the trial court made detailed comprehensive findings of fact on every aspect of the operation of the agency offices and their relationship to petitioner. Both courts below have concurred in these findings. Thus the conflict would exist only upon petitioner's assumption that the findings of fact in the instant case are "clearly erroneous." As pointed out, *supra,* p. 1, fn. 1, there is no basis for indulging this assumption.

Moreover, a number of the factors which the *Blankenship* opinion characterized as "determinative" have since been held by this Court not to be of particular significance, such as lack of control over hours and details of work (*Rutherford Food Corp.* v. *McComb, supra; United States* v. *Silk, supra;* see also *Walling* v. *American Needlecrafts, Inc.,* 139 F. 2d 60 (C. C. A. 6)); lack of control over the premises on which the work is performed (*Bartels* v. *Birmingham, supra;* see also *Walling* v. *American Needlecrafts, Inc., supra; Walling* v. *Twyeffort Co., Inc., supra*); the fact that the agents were not required to devote full and exclusive time to the work of the agency (see *United States* v. *Silk,*

supra; see also *Walling* v. *American Needlecrafts, Inc., supra; Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (C. C. A. 6); *Walling* v. *Twyeffort Co., Inc.,* supra); that the agents could hire employees and were not themselves personally required to perform the services for the agency operations (see *Rutherford Food Corp.* v. *McComb, supra*); and that the agents were paid on the basis of the traffic handled and not by a fixed salary or wages (*Rutherford Food Corp.* v. *McComb, supra; United States* v. *Rosenwasser,* 323 U. S. 360; *Walling* v. *American Needlecrafts, Inc., supra*).

3. The court below correctly held that Section 2 (d) of the Portal-to-Portal Act of 1947 has no application to this case (R. 1228–1229).[5] Section 2 of the Portal Act provides that no employer shall be subject to any liability or punishment for failure to pay an employee for an activity "engaged in prior to the date of the enactment of this Act, except an activity which was compensable" by either a contract in effect between such employee and his employer or by "a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed."[6]

[5] The petition makes the Portal Act point only with respect to the employees engaged to assist the 9–A agents. Petitioner apparently concedes that the Portal Act has no bearing on the injunction issued by the lower court as it relates to those 9–A agents who are themselves engaged in the operation of Western Union equipment.

[6] Since this section of the Portal Act limits liability under the Fair Labor Standards Act, it would seem that it should

Petitioner apparently assumes, for purposes of this point, that it was the employer of the agency personnel, and argues that under the Portal Act it is relieved of liability to those engaged by the 9–A agents because it had no contract, practice, or custom to pay them. Thus petitioner's contention, in effect, is that under the Portal Act an employer is relieved of the obligations imposed by the Fair Labor Standards Act if the arrangements for compensating his employees are made by someone else. Neither the statutory language nor the purposes of the Portal-to-Portal Act lend any support to this contention.

The activities of the agency employees were clearly "compensable," by contract as well as by custom or practice in effect at the establishments where they worked. The contracts pursuant to which these employees were paid can properly be considered as contracts between these employees and petitioner. The agents with whom petitioner had contracts to pay for the telegraph services plainly acted "directly or indirectly in the interest" of petitioner in hiring and contracting to compensate the other personnel (see Section 3 (d) of the Fair Labor Standards Act). Congress made it clear that in enacting the Portal Act it had no intention of modifying the scope of employment under the Fair Labor Standards Act.

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be construed to apply only to those "plainly and unmistakably within its terms and spirit." See *Phillips Co.* v. *Walling*, 324 U. S. 490, 493; cf. *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337, 340–341 (C. C. A. 6).

Section 13 (a) of the Portal Act specifically provides that the term "employer" and "employee" when used in relation to the Fair Labor Standards Act shall have the same meaning as when used in that Act.[7] Consequently, if the courts below have correctly held that an employment relationship exists between petitioner and the employees at the agency offices, it follows that the contracts under which they have been compensated may be deemed to have been made on behalf of petitioner as employer. Moreover, whether or not there were contracts between the employer and the employees to pay for these activities, there was clearly a custom or practice at the establishments to pay for them, and the Portal Act does not require that this custom or practice be between the employer and the employee. Section 2 (a) (2).

Wholly apart from the fact that the activities of the employees here may properly be considered compensable under contract, custom or practice and therefore outside the literal terms of the Portal Act, petitioner's construction of Section 2 of the Portal Act would result in a serious distortion of the legislative purpose. That purpose, as is apparent from the background of the statute, its legislative history, and the statutory language it-

[7] Section 13 (a) provides: "When the terms 'employer,' 'employee,' and 'wage' are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938."

self, is not to permit employers to shift liability under the Act for clearly compensable activities, but to relieve employers of liability for particular kinds of activities which were not thought to be compensable at all, such as portal-to-portal and other comparable activities. The Portal Act was not intended to change the established law that an employer cannot escape responsibility under the Act by contracting that someone else shall be responsible. Cf. *Rutherford Food Corp.* v. *McComb, supra; Southern Ry. Co.* v. *Black,* 127 F. 2d 280 (C. C. A. 4); *Bartels* v. *Birmingham, supra* The immediate and primary reason for its enactment was to deal with the problems arising out of lawsuits filed after the decision in *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680. This is reflected in the findings and statement of purposes in Section 1 (a) of the Act, as well as in the legislative history. See S. Rept. No. 48, 80th Cong., 1st sess., pp. 3–4; H. Rept. No. 71, 80th Cong., 1st sess., p. 3.[8] Neither in the committee reports nor in the debates is there any indication that the Portal Act was intended to permit an employer to escape liability for compensable work performed under the Fair Labor Standards Act.

[8] H. Rept. No. 71, 80th Cong., 1st sess., pp. 2–6; S. Rept. No. 48, 80th Cong., 1st sess., pp. 1–41. See also, the remarks of Congressman Gwynne, author of the House bill, 93 Cong. Rec. 1492 (1947), and the remarks of Senator Donnell, who had charge of the measure on the Senate floor, 93 Cong. Rec. 2086–2098 (1947).

An additional reason why Section 2 of the Portal Act has no applicability here, as the Court of Appeals correctly pointed out, is "that the Wage and Hour Administrator is not seeking to subject an employer 'to any liability or punishment' under the Fair Labor Standards Act, but is seeking to prevent future violations of the act, * * *" (R. 1229). There is no basis either in its language or history for the contention that Section 2 was intended to apply to an injunction proceeding the only purpose of which is to restrain future violations. Petitioner relies on the Conference Report which indicates that the denial of jurisdiction in Section 2 (d) is applicable to actions for an injunction (Pet. p. 33). But this Conference Report statement plainly refers to an injunction proceeding only "*to the extent* that such action or proceeding seeks to enforce any liability or impose any punishment *with respect to a past activity* * * *" (H. Rept. No. 326, 80th Cong., 1st sess., p. 11; italics supplied). Since petitioner does not suggest that its practices changed subsequent to the enactment of the Portal Act and since the contrary is evidenced by the stay of the injunction pending final disposition of the case by this Court, its reliance on Section 2 of that Act, which deals only with past claims, is plainly misplaced.[9]

[9] The reasons for remanding *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 795, and *Alaska-Juneau Gold Mining Co.* v. *E. E. Robertson*, 331 U. S. 793 (both remanded, June 16,

Where, as here, the defenses provided by the Portal-to-Portal Act are plainly inapplicable, this Court has found no occasion to grant review on this ground. See *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, petition for rehearing denied October 13, 1947; *Bibb Mfg. Co.* v. *McComb,* October Term 1947, No. 495, petition for certiorari denied, February 16, 1948.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

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MARCH 1948.

1947), for consideration by the district courts of Portal Act defenses do not apply in the instant case (1) because those cases were suits by employees on claims for past liability, whereas this action by the Administrator seeks only prospective relief, and (2) the availability of defenses urged under Sections 9 and 11 of the Portal Act in those cases depended upon consideration of evidence not yet in the records, whereas only a purely legal question of the interpretation of Section 2 of the Portal Act is involved in the instant case and the record before this Court suffices to show the inapplicability of the asserted defense.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201:

SEC. 3. As used in this Act— * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates— * * *

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in

commerce or in the production of goods for commerce— * * *

(3) For a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

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Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st Sess.:

SEC. 1. (a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary

collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards

Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

* * * * *

SEC. 2. Relief From Certain Existing Claims Under the Fair Labor Standards Act of 1938, as Amended, the Walsh-Healey Act, and the Bacon-Davis Act.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity,

between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

* * * * *

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

* * * * *

SEC. 13. Definitions.—

(a) When the terms "employer," "employee," and "wage" are used in this Act in relation to the Fair Labor Standards Act of 1938, as amended, they shall have the same meaning as when used in such Act of 1938.

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